which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

Applying that section to the facts of this case we find:—

(i) A settlement, made subsequently to the date of the will and relating to the Robinson Road property which is comprised in the will, which conveys the property to trustees upon certain trusts;

(ii) The settlement does not revoke the will;

(iii) The proviso to the settlement leaves the testator with power to dispose of the property by will at time of his death.

Then how can the case which I am considering escape the operation of section 18? *Theobold,* in the 10th Edition at page 129, appears to consider that the effect of this section is merely to cover the *Saxton v. Saxton*[6] class of case, where a testator at the time of making his will held the leasehold of property which he devised and after the date of the will purchased the freehold; and it was held that the devise operated to include the freehold. But in what way can the section avoid being applied to the present case except by importing into it words which it does not contain? And that is what Mr. Green, who robustly contends that the strong expressions of opinion of all the Law Lords in *Airey's*[1] *case* are incorrect, says that I must do. He says that the section must be read as if it said: "..... shall prevent the operation of the will *according to the intention of the testator* ....." He sees a distinction between section 18 on the one hand and sections 19 and 21 on the other in that the former is negative ("shall prevent") and the latter are positive (shall be construed.") Section 18, he says, does not render nugatory the subsequent "conveyance or other act," but merely stops it from preventing the operation of the will in accordance with the testator's intention with respect to what is left. He gives as an example the case of A who devises property to B, and by a subsequent Settlement conveys the property to C and D as trustees in trust for B, reserving to himself a general power of appointment. Thus at the date of the will the freehold is vested in A, but at the date of his death it is vested in the trustees, though A still has a general power of appointment over it. He says that section 18 does not prevent the operation of the devise on what is left, namely the power of appointment. But the inescapable distinction between section 18 on the one hand and sections 19 and 21 on the other is that in the latter two sections the Court is required to consider the testator's intention, but not the former. Section 18 is, in my opinion, clear and unambiguous. The absence of any reference to intention makes it all the stronger by comparison with sections 19 and 21. And the words which Mr. Green would have me import into section 18 would remove the distinction between that section and sections 19 and 21. In construing section 18 I hold that the testator's intention is immaterial, and I consider that I am bound by the wording of the section. The effect of section 18 is that the trusts of the will must prevail over the trusts of the settlement.

Solicitors for the plaintiff: *Allen & Gledhill.*

Solicitors for the defendants: *Braddell Bros.*

In re NG KIM KANG, DECD.; TAN JOOI KHIM (f) v. NG JOOI THONG & ORS.

[O. C. J. (Wilson, J.) March 22, 1954]

[K. L. — Originating Summons No. 132 of 1953]

Will — Interpretation of — Implied life interest under discretion given to one trustee in will — Court's intervention therefrom.

By his will the deceased appointed the applicant (his wife) and the respondents to be his trustees. The main questions to be considered were: (1) whether by the terms of the will, there was an implied condition that the applicant was to receive only a life interest liable to be divested on distribution; and (2) whether the Court could intervene with the discretion given to the applicant under clause 9 of the said will which read as follows:

"I direct that the maintenance of my wife and family, the marriage, educational and other expenses of my children shall be paid out of my estate at the sole discretion of my wife the said Tan Jooi Khim."

Held: (1) as the property was declared to be distributed at a date which might well be, and in fact was, before the death of the applicant there was no implication that she should take only a life interest; (2) clause 9 of the will could not be regarded as having given the applicant an uncontrollable or irresponsible discretion and therefore the Court could intervene being bound to consider the interests of the beneficiaries other than the applicant.

Cases referred to:—

(1) *Blackwell v. Bull* (1836), 1 Keen 176; 48 E.R. 274.

(2) *Ralf v. Carrick* 5 Ch. D. 984.

(3) *Costabadie v. Costabadie* (1847), 6 Hare 410; 67 E.R. 1225.

(4) *In re Charteris, Charteris v. Biddulph* (1917) 2 Ch. 379.

(5) *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571.

(6) *In re Hodges, Davey v. Ward* (1878), 7 Ch. D. 754.

(7) *In re Roper's Trusts* (1879), 11 Ch. D. 272.
(8) *Tabor v. Brooks* (1870), 10 Ch. D. 273.
(9) *Gisborne v. Gisborne* (1877), 2 App. Cas. 300.

ORIGINATING SUMMONS.

N. A. Marjoribanks for the applicant.

M. N. Cumarasami for the 1st respondent.

A. J. Bostock-Hill for the 2nd respondent.

T. K. Sen for the 3rd respondent.

Cur. Adv. Vult.

Wilson, J. : — In this case the applicant is an executrix and trustee of her deceased husband Ng Kim Kang. By his will the deceased appointed the applicant, his son Ng Jooi Thong, and Ch'ng Ean Jin his business partner, as trustees, and he also appointed another son Ng Jooi Meng to be an additional trustee when he attained the age of twenty-one, Chinese reckoning. These three persons are the respondents. The applicant asks for maintenance out of the estate at the rate of $1,500 a month and arrears of maintenance at the same rate. In his will, the deceased appointed his wife as principal trustee. That is an expression which is unknown to me and I have no idea what he meant. If he had intended that the other trustees should have no say in the administration of the estate, he would not have appointed them as trustees at all. However, he has in certain clauses of his will given the applicant sole discretion. For the purposes of this case it seems to me that the only clause with which I am concerned is clause 9 which reads as follows :—

"I direct that the maintenance of my wife and family, the marriage, educational and other expenses of my children shall be paid out of my estate at the sole discretion of my wife the said Tan Jooi Khim."

It is to be observed that in clause 6 of the will he says :—

"I direct that before my son Ng Jooi Meng is added to the total number of my Trustees . . . . the management of my estate shall be carried out by all my three Trustees jointly."

It has been argued that under the will the applicant has got a life interest in the estate liable to be divested on distribution. Under clause 5 of the will, the testator devised all his properties unto his trustees, subject to payment of debts upon trust to be distributed amongst the beneficiaries at the latest when his youngest son attained the age of twenty-one years, Chinese reckoning, or at such earlier period as his wife might deem advisable. I cannot accept the contention that this gave her a life interest up to the date of distribution. Such a contention appears to me to be inconsistent on the face of it. In support of this contention I have been referred to the case of *Blackwell v. Bull*[1]. The decision in that case was apparently approved in the case of *Ralf v. Carrick*[2]. However, it seems to me to have no bearing on the facts of this case at all. In the case of *Blackwell v. Bull*[1] where it was held that the wife took a life interest by implication, the testator had devised his property in trust that at his wife's decease the whole of it should be equally divided amongst his children. In the will in dispute in this case the property is declared to be distributed at a date which might well be, and in fact is, before the death of the wife.

The next question for consideration is whether this Court can interfere with the discretion given to the applicant under clause 9 of the will. In the case of *Costabadie v. Costabadie*[3], it was held that a discretionary power conferred upon the wife by a will will not be disturbed by the Court so long as it is reasonably and honestly exercised. In the case of *In re Charteris, Charteris v. Biddulph*[4], a similar decision was given. In the case of *Tempest v. Lord Camoys*[5], the Master of the Rolls stated : — "It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly." In the case of *In re Hodges, Davey v. Ward*[6], it was held that the Court had the power to control the discretion of the trustees in the allowance to be made for children, and the Court in fact made an order in opposition to the trustees. In the case of *In re Roper's Trusts*[7], it was held that where a fund was by will given to trustees for infants, and the trustees were desired to pay the income to the mother to be by her applied for their benefit at her discretion, the Court had the power, where the mother had not exercised a sound discretion, to order the income to be paid to the father for the maintenance of the infants. In the case of *Tabor v. Brooks*[8], it was held that where the trustees had power to apply the income of a settled fund for the benefit of the husband and wife and their children as they should in their uncontrolled and irresponsible discretion think proper, the Court declined to interfere with their discretion though expressing the opinion that the trustees were not acting judiciously. In the case of *Gisborne v. Gisborne*[9], it was held that the trustees were entitled to exercise an absolute discretion in the application of a fund when the will provided "my said trustees in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income as they shall think expedient for the personal and peculiar benefit and comfort of my dear wife."

I do not think that the appointment of the applicant as principal trustee, nor the sole discretion conferred upon her by clause 9 of the will, can be regarded as giving her an uncontrollable or irresponsible discretion. I find that the Court can intervene in this matter and therefore it is necessary to consider the circumstances.

At the date of his will, the testator had five children, three of whom were at the time minors but these have now reached the age of twenty-one. In 1951 when a form of compulsory service was introduced in the Federation, the two younger sons went to China and they are now unable to return to the Federation and would not be admitted if they did. So far as they are concerned, it does not seem to be disputed that all that they could receive from the applicant in this country is $45 per month each by reason of certain restrictive financial regulations. The two who went to China are now both of age and are presumably earning their own living in China. The two sons in Malaya are both of age and as trustees agree that the applicant should have $750 a month maintenance. The only other child is a daughter who is now aged twenty-seven. Apparently she is not married and whether or not she earns her own living I do not know. But it seems that, apart from a possible remittance of $90 per month to the two young men in China, the applicant has only to support herself and possibly her daughter. The applicant states that after the reoccupation in 1946 up to at the end of April, 1949, she drew from the trustees $500 a month as an allowance. From the 1st May, 1949 till the end of August, 1949, she says that she drew $1,000 a month. She says that owing to the higher cost of living she requested the other trustees to increase her allowance to $1,500 a month from the 1st September, 1949 but they refused to agree. She admits that in August, 1951, she received a sum of $10,000 from the trustees. There is some dispute as to these dates and the amounts paid to her, but I am satisfied that she did originally receive $500 a month and for a period $1,000 a month. I am also satisfied that she received two other lump sums of $15,000 and $6,750 from the estate and a further sum of $500 on the 30th September, 1949. This information is contained in the affidavit of Ch'ng Ean Jin, one of the trustees who has no financial interest whatever in the estate. The applicant has not filed any affidavit in reply.

I do not think it is necessary to refer in detail to the affidavit of Ch'ng Ean Jin which will, of course, be available to any other Court which may be called upon to consider this matter. I would, however, point out that in the uncontradicted affidavit of Ch'ng Ean Jin it is stated that it was agreed at the meeting of the trustees in June, 1950, that all cheques made out on behalf of the estate must be signed by three trustees, of whom the applicant was one, and that the cheque book and pass book of bank account should be kept by the applicant. It is further stated that after the 21st October, 1950, the applicant made no further application for maintenance until the 25th July, 1951. Obviously, as the cheque book was in the possession of the applicant, no cheque could be made payable to the applicant except at her own instigation.

All the trustees, other than the applicant, are willing to pay the applicant as maintenance $750 per month as from the 1st September, 1951. In my opinion, having regard to the authorities which I have cited above, it is the duty of this Court to consider the interest of the beneficiaries other than the applicant, more particularly as I am told, and I think it is agreed, the time for distribution has now come under the terms of the will.

In all the circumstances I have decided to allow the applicant $750 per month as maintence as from the 1st September, 1951 until such time as distribution can be completed. I also make an order by consent that the costs between solicitors and clients be taxed and paid out of the estate. The allowance cannot of course be paid unless the applicant produces signed cheques for the other trustees to sign.

Order accordingly.

Solicitors — for the applicant: *Lovelace & Hastings;* for the 1st respondent: *M. N. Cumarasami;* for the 2nd respondent: *S. M. Yong & Co;* for the 3rd respondent: *T. K. Sen.*

SUPPAN v. PUBLIC PROSECUTOR.

[C. A. (Mathew, C.J., Wilson & Abbott, JJ.) March 24, 1954]

[K. L. — Criminal Appeal No. 20 of 1954]

Penal Code, s. 302 — Summing up — Assessors — Function of.

The function of the assessors is to give their opinions and their reasons therefor on such particular issues of the fact relevant to the charge as the Court may specify. It is not part of their functions to give their opinions as to what offence (if any) the accused is guilty of This is the function of the Judge who, after considering the opinions of the assessors, delivers judgment and convicts or acquits the accused.

CRIMINAL APPEAL.

R. P. S. Rajasooria for the appellant.

E. Brown (Federal Counsel) for the respondent.